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ADVISORY OPINION NO. 10-041-E

June 11, 2010

Question Presented: May a school superintendent participate in school district actions benefiting a nonprofit corporation when the superintendent also serves of the board of directors of the corporation?

Brief Answer: No. The nonprofit corporation is a “business with which [the superintendent] is associated” because the superintendent serves as a director of the corporation. Pursuant to Section 25-4-105(1), Miss. Code of 1972, the superintendent may not use her position in government to obtain or attempt to obtain any “pecuniary benefit” for the nonprofit corporation. The superintendent should resign from the board of directors of the nonprofit corporation before the school district takes further action.

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 25-4-103, Miss. Code of 1972.

(c) “Business” means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed

individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(d) "Business with which he is associated" means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(l) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(p) "Public servant" means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds;
or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

I am writing this letter to request that you issue an opinion regarding a question raised recently regarding a possible conflict of interest. Specifically, I am asking if there is a conflict of interest as a result of my serving as superintendent of a school district and also as a member of the board of directors of non-profit corporation.

The Corporation is the grantee for the Head Start program in a five-county area, including our County. Through a partnership agreement approved by the School District Board of Trustees and the Board of Directors of the Corporation, the School District provides space for two Head Start classrooms at a Primary School at no cost to the Corporation. The school district provides breakfast and lunch to Head Start children in the two classrooms and receives reimbursement from USDA for the meals served; however, there are no direct monetary payments from the school district to the Corporation or vice versa.

As a member of the Board of Director of the Corporation, I serve without pay as a service to my community. Both United States Department of Health and Human Services and the Office of Head Start encourage collaboration and partnership between school systems and Head Start programs. There is certainly no intent to violate public trust, and neither the Corporation, the City School District nor I have realized any personal gain as a result of the partnership. As a natural consequence of my employment as Superintendent, facilities and services are provided to benefit children. Children who attend Head Start classes at a Primary School are afforded the opportunity to participate in the Head Start program at a location close to their homes.

I appreciate your thoughtful consideration in rendering this opinion. Both Boards await the opinion before entering into a partnership agreement for the 2010-2011 school year.

III. ANALYSIS

A nonprofit organization receiving public funds is a “business,” as defined in Section 25-4-103(c), Miss. Code of 1972. The nonprofit corporation herein is a “business with which [the superintendent] is associated” because the superintendent serves as a director of the corporation. See definition in Section 25-4-103(d). Pursuant to Section 25-4-105(1), the superintendent may not use her position in government to obtain or attempt to obtain any “pecuniary benefit” for the nonprofit corporation. See Section 25-4-103(l). The support provided by the school district to the Head Start program constitutes a pecuniary benefit to the nonprofit corporation. Therefore, the superintendent may not participate in actions, discussions or recommendations regarding the partnership agreement while she remains on the board of directors of the nonprofit corporation.

In many circumstances a public servant can avoid a violation by recusing herself. However, recusal would be highly impractical under these circumstances. Consequently, the commission recommends the superintendent resign from the board of directors of the nonprofit corporation before the partnership agreement is taken up by the school board. Once the superintendent has resigned from the board, the nonprofit will no longer be a business with which she is associated, and she may then fully participate in actions, discussions or recommendations regarding the partnership agreement and the Head Start program.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel